QUESTION PRESENTED

Whether the Board properly refused to allow relitigation in an unfair labor practice case of an issue which either had or could have been determined in a prior, underlying representation proceeding.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the petition (Pet. 3–4). Also relevant is Section 8(a)(5) of the Act, which provides:

> It shall be an unfair labor practice for an employer—
>
> > to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

On April 12 and 13, 1966, some 116 employees working at the petitioner Company's Atlanta, Georgia, terminal engaged in a strike, protesting conditions of employment. At noon on April 13, most of the employees unconditionally asked for reinstatement, which request the Company refused (Pet. App. A, 19; R. 10, 87–90).[1]

On April 20, 1966, Truck Drivers Local Union No. 728 filed a petition for an election, seeking to represent the Company's city drivers and various other

[1] "R." references are to the Appendix to the parties' briefs filed in the court below.

employees (Pet. App. A, 13). After a hearing was held on June 10, 1966, the Regional Director ordered a representation election in which, he held, approximately 42 individuals who participated in the April 12 and 13 work stoppage would be ineligible to vote, because they were permanently laid-off employees who did not have a reasonable expectancy of reemployment in the near future (Pet. App. A, 13–14; R. 14–16). On June 17, 1966, the Union filed a request for review of the Regional Director's decision, contending that the employees were "economic strikers on layoff with a reasonable expectancy of recall" in the near future, and therefore should be allowed to vote in the election (Pet. App. A, 14; R. 17–18). On June 28, 1966, the Board, pending consideration of this request for review, empowered the Regional Director to conduct the election and to allow the individuals who participated in the work stoppage to vote under challenge (Pet. App. A, 14; R. 35). The election was held on June 29, 1966, with 122 ballots cast for the Union, 163 against, and 67 ballots challenged, a number sufficient to affect the outcome (Pet. App. A, 14–15; R. 37).

In the meantime, on June 13, 1966, the Union had filed the first of several unfair labor practice charges against the Company, protesting the discriminatory treatment of 57 employees who participated in the strike (R. 85). On August 26, 1966, the Board advised the parties that, since the Union's request for review of the Regional Director's decision concerned the

eligibility of individuals engaged in a work stoppage who might also be involved in the challenges to certain ballots, and since unfair labor practice charges relating to such individuals had been filed, it would make no further decision in the representation case at that time. Instead, it would stay its hand until the Regional Director had investigated the challenges to the ballots, the objections to the election which the Union had filed and the unfair labor practice charges, and had taken appropriate action (Pet. App. A, 15; R. 53). Thereafter, on September 30, 1966, the Regional Director issued a supplemental decision in which, *inter alia,* he overruled the Union's objections to the election but deferred resolving the issue of the voting eligibility of 57 named strikers until disposition of the unfair labor practice charges, which alleged that those individuals had been unlawfully denied reinstatement by the Company (Pet. App. A, 15–16).

A complaint in the unfair labor practice case issued on October 5, 1966, and a hearing ensued before a trial examiner (R. 85). On June 19, 1967, the Board issued its decision in that case. It found that the employees participating in the April work stoppage were economic strikers who had unconditionally offered to return to work at noon on April 13, 1966, and who had not been permanently replaced. Accordingly, it determined that, under settled principles, the Company had violated Section 8(a)(1) of the Act by failing to reinstate the strikers promptly, and ordered,

inter alia, the reinstatement of these employees (Pet. App. A, 16–17; R. 99–101, 105–106).[2]

On October 12, 1967, the Regional Director issued his second supplemental decision in which, upon noting the Board's decision in the companion unfair labor practice case, he ruled that the 57 individuals were eligible voters and ordered that their ballots be counted (Pet. App. A, 17; R. 118–120).

On October 23, 1967, the Company filed a request for review of the Regional Director's second supplemental decision, arguing, *inter alia,* that in the unfair labor practice case no evidence was presented which would show that the strikers had a reasonable expectancy of reemployment, and that the Regional Director's original decision of June 10, 1966, should be upheld (Pet. App. A, 17–18; R. 120–128). On October 31, 1967, the Board denied the request for review (Pet. App. A, 18; R. 133).

The 57 challenged ballots were opened and counted; the revised tally showed that 178 ballots were cast for the Union, and 164 against (Pet. App. A, 18, n. 5; R. 139–140). On November 9, 1967, the Regional Director certified the Union as the exclusive bargaining representative of the employees in the appropriate unit (Pet. App. A, 18; R. 141–142). The Company refused the Union's request for recognition and bargaining

[2] The Board's order, reported at 165 NLRB No. 80, was enforced in *Truck Drivers & Helpers Local No. 728, IBT* v. *National Labor Relations Board*, 403 F. 2d 921 (C.A.D.C.), certiorari denied *sub nom. Georgia Highway Express, Inc.* v. *National Labor Relations Board*, 393 U.S. 935.

(Pet. App. A, 12; R. 153, 154–156), the Union filed unfair labor practice charges, and the Board's General Counsel issued a complaint alleging that such refusal violated Section 8(a)(5) and (1) of the Act (Pet. App. A, 11). The Company's answer admitted the refusal to bargain, but asserted that such refusal was lawful since the Union's certification was invalid because of the absence of any showing, in the prior unfair labor practice proceeding, "that the persons named on the charges were or ever had been employees" of the Company (Pet. App. A, 12; R. 150).

The Board's General Counsel thereupon moved for summary judgment on the ground that the only issues raised in defense had already been fully litigated and determined adversely to the Company in the earlier unfair labor practice proceeding (Pet. App. A, 12; R. 157–160). Subsequently, on February 15, 1968, the Board issued an order transferring the proceeding from a trial examiner to the Board, with a notice to show cause why the General Counsel's motion should not be granted (Pet. App. A, 12; R. 160–161). The Company filed a response on February 29, 1968, requesting the Board to deny the motion, or in the alternative, to grant a hearing to permit the Company to present evidence in support of its answer (Pet. App. A, 12; R. 172–176). The Company argued, in part, that no evidence was ever "taken by the Regional Director to ascertain whether or not the 57 challenged ballots * * * were ever employees of the [Company]," or whether they were employees "either

at the time of the casting of said ballots or thereafter * * *," and that it had been denied a hearing to present evidence with respect thereto (R. 173, 174–175).

The Board found, however, that the employee status of the 57 challenged voters and their eligibility to vote had been determined in the prior unfair labor practice case decided during the pendency of the representation proceeding; that the Company was merely attempting to relitigate the identical matters which had been resolved in those proceedings; and that it did not offer to adduce any newly discovered or previously unavailable evidence, nor allege any special circumstances which would require the Board to reexamine its court-enforced decision in the earlier unfair labor practice case or the representation proceeding (Pet. App. A, 19–20). Accordingly, the Board, granting the General Counsel's motion for summary judgment, found that the Union was duly certified as the collective bargaining representative of the Company's employees in the appropriate unit described in the Board's certification, and that the Company's admitted refusal to bargain had therefore violated Section 8(a)(5) and (1) of the Act (Pet. App. A, 22). The Board ordered the Company to bargain with the Union upon request (Pet. App. A, 24–25).

The court of appeals enforced the Board's order. It held that the Company had its "day in court" in the first unfair labor practice and representation proceedings to litigate the "key question" of the employee status, and eligibility to vote, of the 57 individuals

whose votes were challenged. Accordingly, the court concluded that the Board had not abused its discretion in refusing to permit the Company to relitigate these issues in the second unfair labor practice case involving the Company's failure to recognize the previously certified Union. (Pet. App. A, 4–7.)

ARGUMENT

It has long been recognized that, when an unfair labor practice proceeding is simply a means of enforcing the Board's determination in a representation case, the two proceedings "are really one" and "a single trial of the [representation] issue [is] enough." *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U.S. 146, 158, 162. The courts have uniformly approved the Board's rule that, absent extraordinary circumstances, they will not permit relitigation in the unfair labor practice case of issues which have been or should have been litigated in the underlying representation proceeding.[6]

Petitioner does not challenge this settled practice. The crux of its contention here (Pet. 8, 12) is that the employee status of the individuals who the Board found in the first unfair labor practice case had been

[6] *National Labor Relations Board* v. *National Survey Service, Inc.*, 361 F. 2d 199, 201–202, 204, 206 (C.A. 7); *Neuhoff Bros. Packers, Inc.* v. *National Labor Relations Board*, 362 F. 2d 611, 612–613 (C.A. 5), certiorari denied, 386 U.S. 956; *National Labor Relations Board* v. *Difco Laboratories, Inc.*, 389 F. 2d 663 (C.A. 6), certiorari denied, 393 U.S. 828; *National Labor Relations Board* v. *Sun Drug Co.*, 359 F. 2d 408 (C.A. 3); *Rockwell Manufacturing Co.* v. *National Labor Relations Board*, 330 F. 2d 795, 797 (C.A. 7), certiorari denied, 379 U.S. 890.

unlawfully denied reinstatement on April 13, 1966, was not determinative of their eligibility to vote in the June 1966 election; that no hearing was afforded to petitioner in either the representation or unfair labor practice case with respect to the eligibility issue; and that therefore the bar against relitigation is inapplicable here. But, as the court of appeals pointed out, petitioner failed to raise this issue with any meaningful specificity at the representation stage of the present proceedings; nor did it offer to tender any evidence bearing upon the voting eligibility issue other than the evidence upon which it had unsuccessfully relied in the first unfair labor practice case in arguing that the employees were not entitled to reinstatement on April 13, 1966. As the court below further pointed out, petitioner merely offered to present evidence "'to show that the employees were replaced and had no reasonable expectancy of reemployment at the time of election'—wording also applicable to persons claimed to be without employee status on April 13" (Pet. App. A, 6). Indeed, even now petitioner does not indicate what other evidence it would adduce in support of its claim that the 57 employees had become ineligible to vote between April 13, when it unlawfully denied the request for reemployment, and the June election.

In these circumstances, the Board was not required in the second unfair labor practice case to consider "new allegations and evidence pertinent to the representation issue, which could have been advanced at the earlier stage." *Rockwell Manufacturing Co.* v.

National Labor Relations Board, 330 F. 2d 795, 797 (C.A. 7), certiorari denied, 379 U.S. 890. Cf. *United States* v. *Tucker Truck Lines,* 344 U.S. 33, 36–37. To allow petitioner another hearing on this already litigated issue would run counter to the Board's consistent and salutary practice in such situations. That practice is grounded on the premise that, since the prompt disposition of timely objections or challenges in representation proceedings is a critical element in election cases, representation issues should be finally resolved at that stage rather than, perhaps months later, at the hearing on an unfair labor practice complaint based upon the underlying representation proceeding. All those courts which have considered the matter have agreed. *E.g., National Labor Relations Board* v. *Rexall Chemical Co.,* 370 F. 2d 363, 366 (C.A. 1); *National Labor Relations Board* v. *Sun Drug Co.,* 359 F. 2d 408, 414 (C.A. 3).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.

FEBRUARY 1970.

U.S. GOVERNMENT PRINTING OFFICE 1970